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JAMES [illegible], Clerk

No. 676

IN THE

Supreme Court of the United States

October Term, 1958

MERCHANT'S FAST MOTOR LINES, INC., *Petitioner*

v.

J. R. LANE, ET AL., *Respondents*

REPLY TO PETITION FOR CERTIORARI

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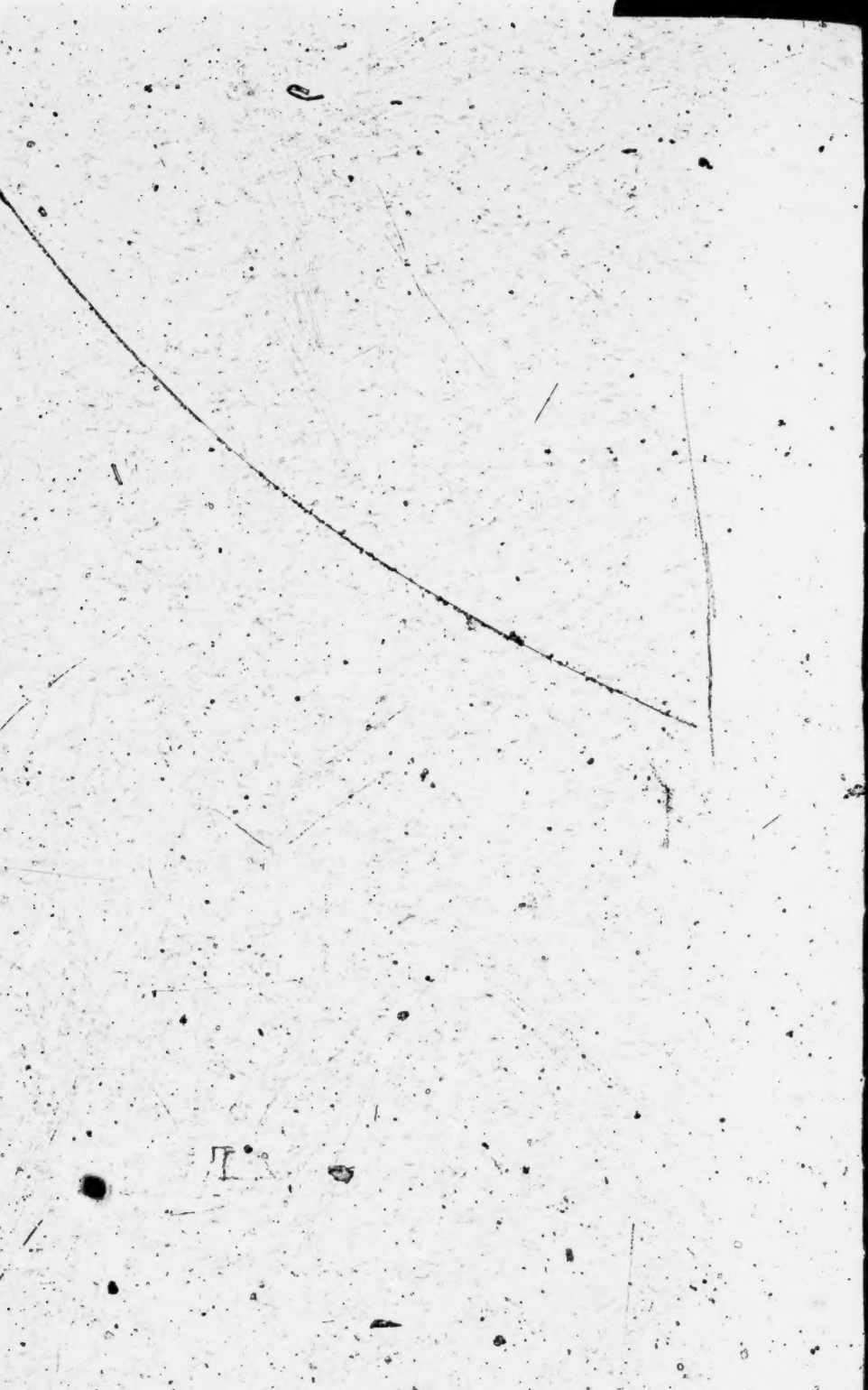

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INTRODUCTION

Petitioner has struggled, with admirable effort but insignificant result, to raise a question of substance for review. All the discussion of *Rylands v. Fletcher*, of the Constitutions of Texas and of the United States, is so much gloss and glitter. When the superfluities of irrelevant double-talk are swept away, it remains clear in this record that Petitioner's truck driver was found guilty of violating a Texas Statute, was convicted of negligence in so doing, and his negligence was found to be a proximate cause of serious, permanent, disfiguring and disabling injuries to a little girl. Such a series of findings is quite

uniformly held in this country, as well as in Texas, to be sufficient to sustain a judgment for substantial damages.

The complaint which Petitioner seeks to bring before this honorable court, is a narrow, insubstantial, hypertechnical quibble over the form of the special issue in response to which its truck driver was found negligent by the jury. The form of a special issue cannot be properly considered without an adequate statement of the facts raising its submission. Since the Petition wholly fails to develop those facts, Respondents consider a brief statement to be appropriate and necessary.

STATEMENT

This accident occurred in the City of Coleman, Texas, on Walnut Street, in the block between Colorado and San Saba Streets. Walnut Street is wide enough for four lanes of traffic (R. 32). From Colorado Street on the West, to San Saba Street on the East, is about 300-350 feet (R. 143). Just before the accident, Petitioner's truck had stopped at a red light at Colorado and Walnut, and Respondents' car stopped behind it. (R. 99)

When the light turned green, the truck proceeded East, the car following. The truck driver saw the car in his rear view mirror just after leaving this intersection. (R. 214) In his deposition he testified that he saw the car again when he was about 125-150 feet from San Saba Street. (R. 226) However, at the trial, he contradicted his deposition, and stated that he did not see the car again until it was alongside his window. (R. 230) After the car had gone about one-third of the block, it swung out to pass. (R. 45, 100) At this point, the car was over 200 feet West of San Saba Street. (R. 143) A disinterested

witness to the East clearly saw the truck and car alongside each other at and after this point. (R. 71, 72) From this point on, the truck driver should have been able to see the car in his rear view mirror.

The car reached the front end of the truck trailer without mishap. (R. 46, 100) At this point, the truck driver had never given a signal for a left hand turn. (R. 46, 100) Ward Lane, the driver of the car, and Peggy Lane, his passenger, both swore that he never did signal. (R. 46, 100) Petitioners' witness Greer, who watched the two vehicles all the way down the block, never saw the truck's signal arm extended. (R. 190)

As the Lane car attempted to go on around, the truck suddenly swung across the center line into the car's path, before reaching the intersection of Walnut and Saba Streets. (R. 46, 100) The physical evidence of skid marks and the position of the truck after the accident, showed that the truck was "cutting the corner". The truck never reached the center of the intersection, yet its left front wheel was only 17 feet from the Northwest corner of the intersection on this 54 feet wide street. (R. 29) Pictures of the truck taken shortly after the collision and before it was moved, showed the trailer extended in a straight line behind the tractor, and showed most of the length of the truck across in the North lane of Walnut Street.

When the truck swung in front of him, Ward Lane attempted to avoid it by bearing to the left. (R. 46, 100) However, the truck swung on and struck the car in its right rear fender. (R. 55) The car went into the intersection out of control, crossed San Saba Street, and hit the corner of a house just across the curb. (R. 47) Peggy

Lane's head went through the windshield. While others ~~who~~ attempted to help Peggy, who was bleeding severely, the truck driver was seen raising the signal arm by the side of his truck. (R. 87, 93) It was no wonder that the jury disbelieved the truck driver's protestations that he had raised the signal arm before turning! (R. 213, 214) Under the evidence, and in view of the jury's findings, the conclusion is unavoidable that the truck driver turned

(1) before reaching the intersection;
(2) without looking to the rear;
(3) without ascertaining that his turn could be made with safety;
(4) into the immediate path of the car, which was already alongside him, and
(5) that the car was in a position where he could have readily seen it alongside him, had he looked into his rear view mirror before turning.

This evidence was directed to issues of fact which had been framed by the Court in a pretrial order, approved by Counsel for both parties. (R. 8-16) The first issue of fact suggested in the pretrial order reads as follows:

> "Was the Defendant's truck guilty of negligence in any of the particulars contended by Plaintiffs?" (R. 14)

This incorporates Plaintiffs' content on 2(a), that Defendant's driver was guilty of negligence, "in attempting to turn his vehicle from a direct course and to move his vehicle left on a roadway at a time when such movement could not be made with safety." (R. 11)

Special Issue No. 4, about which ~~Plaintiff's~~ Petitioner complain, was as follows:

"Do you find from a preponderance of the evidence that at the time of the collision in question, Louis D. McManus, the driver of defendant's truck tractor and semi-trailer, was guilty of negligence in any of the following respects:

That said McManus prior to the collision in question failed to keep a proper lookout as that term is defined, in driving along Walnut Street in the City of Coleman, Texas, or

That said McManus turned his vehicle from a direct course and moved his vehicle left upon a roadway at a time when such movement could not be made with safety, or

That said McManus made a lefthand turn without first signalling his intention to do so?

Answer: 'Yes' or 'No'.

Answer: Yes."

Special Issue No. 2 was as follows:

"Do you find from a preponderance of the evidence that any such negligence on the part of said McManus, driver of defendant's vehicle, was a proximate cause of the collision in question?

Answer: 'Yes' or 'No'.

Answer: Yes."

Special Issues No. 3 and 4 submitted the defensive issues of contributory negligence and proximate cause as follows:

Special Issue No. 3:

"Do you find from a preponderance of the evidence that at the time of the collision in question, Ward Lane, the driver of the automobile in which plaintiff, Peggy Lane, was riding, was guilty of negligence in any of the following respects:

That the said Ward Lane failed to keep a proper lookout as that term is defined herein in driving along Walnut Street, or

That the said Ward Lane failed to observe and heed the automobile signal arm which had been extended, if you so find, in order to show that the defendant's vehicle was going to make a left turn, or

That the said Ward Lane attempted to pass defendant's vehicle at or near the intersection and at a point within 100 feet of the intersection of Walnut and San Saba Streets, in violation of Section 57, Article 6701d, Uniform Act Regulating Traffic on Highways of the State of Texas, or

That the said Ward Lane was driving at an excessive rate of speed, that is, at a rate of speed faster than a person of ordinary care and prudence would have driven under the same or similar circumstances, or

That the said Ward Lane was driving at a rate of speed in excess of 30 miles per hour, in the incorporated City of Coleman, Texas?

Answer: 'Yes' or 'No'.

Answer: Yes."

Special Issue No. 4:

"Do you find from a preponderance of the evidence that any such negligence on the part of said Ward Lane, as you have found in answer to Special Issue No. 3 was not the sole proximate cause of the collision?

In answering this issue, you are reminded that sole proximate cause means the only proximate cause of the collision.

Answer: 'It was the sole proximate cause' or 'It was not the sole proximate cause'.

Answer: It was not the sole proximate cause."

PETITIONER HAS MISCONSTRUED SPECIAL ISSUE NO. 1

Evidently, the confusion so apparent in the Petition for Certiorari has been caused by Petitioner's labored misconstruction of the issue submitted by the Court. Liability without fault is not involved here; neither is negligence *per se*. The trial Court very clearly asked the jury to find whether or not Petitioner's truck driver moved his vehicle to the left at a time when such movement could not be made with safety, and also, if he did, whether such act on his part was negligence. In fact, since negligence and proximate cause were properly defined (R. 253), the issues might be paraphrased as follows:

> Did the truck driver fail to exercise ordinary care in turning at a time when he could not do so with safety, thereby causing an injury and collision that was the natural and probable consequence of his turn and which ought to have been foreseen by a person of ordinary prudence?

Although Petitioner has attempted to confuse the holding of the Court of Appeals, the Court of Appeals very clearly held that the charge did not authorize an affirmative finding unless the jury should find that Petitioner's truck driver's conduct was negligent. We quote from the majority opinion:

> "In Special Issue No. 1, the Court asked the jury to examine the circumstances existing at the time the motorist must make his decision to turn. The jury must then decide whether a prudent person would have turned his vehicle *at that time*.
>
> "It seems to us that the charge attempts to make plain to the jury that the duties imposed by the stat-

> utes are conditional; the charge is designed to prevent the jury concluding that the duties imposed by the statute are absolute, the failure to observe them is negligence per se. The charge instructed the jury to avoid the conclusion that the driver of the lead vehicle must have been negligent or the accident would not have occurred."

Petitioner seeks to leave with this Court the impression that Respondents' counsel thought Special Issue No. 1 submited the violation of the statute as negligence *per se* (Petition page 8). We quote from the original brief of Respondents in the Court of Appeals:

> "The issue was not submitted as negligence per se, the trial court, having, without objection, required the jury to find negligence as well as a violation of the statute before giving an affirmative answer." (Appellees' Brief, page 7).

Furthermore, Petitioner's own counsel has admitted that the negligence standard is applied to the conduct of the truck driver by this Special Issue. At page 10 of Appellant's Written Argument filed in the Court of Appeals, Petitioner's counsel discussed the case of *Booker v. Baker*, 306 S.W. 2d 770 (Tex. Civ. App. 1957, error ref. N.R.E.). In that case, two separate Special Issues were employed by the trial court, the first inquiring whether or not the driver turned to the left at a time when such movement could not be made with safety; the second, whether or not such manner of driving was negligence. Petitioner admitted that "in the case of *Booker v. Baker, supra*, the question involving the violation of Section 68a, Article 6701d, Vernon's Ann. Civ. Stat. *was submitted in substantially the same manner as*

was employed by the trial court in the instant case." (Emphasis supplied.)

The record, the briefs, and the written arguments on file show that Petitioner, Respondent, and the Court of Appeals were all of the opinion that before authorizing a judgment for Plaintiffs, the Trial Court required the jury to find:

(1) That the truck driver turned left when it was unsafe for him to do so (thereby violating the statute);

(2) that he violated the duty of ordinary care in so doing, and

(3) that in so doing he caused a collision which was the natural and probable consequence of his act, which collision he ought to have foreseen.

Moreover, Special Issues Nos. 1 and 2 submit the ultimate issue of fact as framed by the pretrial order, agreed to by both parties, in virtually the identical language of the pretrial order. In addition, it is fair to point out, that Petitioner's defensive issues Nos. 3 and 4, employed exactly the same form as was employed in Special Issues Nos. 1 and 2. The goose and the gander supped the same sauce out of the same dish.

Against this background, it is difficult for us to perceive how Petitioner can draw any connection with strict liability under the case of *Rylands v. Fletcher* (Petition, pp. 6 and 7), or with making Petitioner an insurer (Petition, p. 7) or with finding Petitioner negligent merely because there was an accident (Petition, p. 10). Petitioner has gainsaid its present position too many times to be heard in respect to such inapplicable principles on an attempted review of the Court of Appeals opinion.

THE SPECIAL ISSUE CORRECTLY FRAMED AN ULTIMATE ISSUE OF FACT UNDER APPLICABLE TEXAS SUBSTANTIVE LAW.

The language of the statute involved has been correctly quoted in the Petition. It is agreed that Subdivision (b) of Special Issue No. 1 tracks the language of the statute. One of the most familiar principles of Texas law is that a Special Issue involving an alleged statutory violation should be framed in the language of the statute. *Suarez v. Wheeler*, 86 S.W. 2d 735, 737 (Tex. Com. App. 1935); *Havens v. Guetersloh*, 255 S.W. 2d 233 (Tex. Civ. App. 1952, Error Ref. N.R.E.); *Banks v. Robinson*, 289 S.W. 2d 844 (Tex. Civ. App. 1956, No Writ History); *Wenski v. Kabitzke*, 257 S.W. 2d 153 (Tex. Civ. App. 1953, No Writ History); *Ervay-Canton Apartments v. Hatterick*, 239 S.W. 2d 150, 153 (Tex. Civ. App. 1951; Error Ref. N.R.E.). After an extensive search, Respondents have been unable to find any case decided by a Texas Court in which the trial court was ever reversed for incorporating the exact language of a statute in a special issue submitting an alleged violation of such statute. (However, Texas trial courts have been reversed for failing to submit such an issue in the statutory language. See, e.g., *Ervay-Canton Apartments v. Hatterick*, *supra*.)

Statutes similar to the one considered here are very frequently found in the codes of the various states. Some of the states have held that a violation of the statute is negligence *per se*. *Snowden v. Webb*, 64 So. 2d 745 (Miss. 1953); *Morris v. Crumpton*, 67 So. 2d 800 (Ala. 1953); *American Fidelity and Casualty Company v. Drexler*, 220 F. 2d 930 (C. A. La. 1955); *Frankland v. Peterson*, 67

N.W. 2d 865 (Wis. 1955); *Mustin v. Butterworth*, 2 CCH Auto. Cases 2d 176 (Tenn. Ct. App. 1953); *Manning v. O'Rourke*, 120 Cal. App. 432, 8 P. 2d 181 (1932); Arnold v. Busby, 298 S.W. 2d 627 (Tex. Civ. App. 1957, Error Ref. N.R.E.).

Other decisions hold that a finding of the violation of the statute must be coupled with a finding of failure to use ordinary care, that is, a finding of negligence. *Gunn v. Watson*, 233 N.C. 65, 62 S.E. 2d 538 (1950); *Booker v. Baker*, 306 S.W. 2d 767 (Tex. Civ. App. 1957, Error Ref. N.R.E.); *Williams v. Price*, 308 S.W. 2d 185 (Tex. Civ. App. 1958, Error Ref. N.R.E.).

All of the decisions seem to be in accord in holding that the statute imposes a duty beyond the duty of keeping a proper lookout. See, e.g., *Sohio Petroleum Co. v. Fowler*, 94 So. 2d 350 (Miss. 1957); and *Werner Transportation Co. v. Zimmermann*, 201 F. 2d 687 (7th Cir. 1953).

Thus, all of the decisions construing statutes similar to Article 6701d, Sec. 68a, V.A.C.S., hold that such statute creates the affirmative duty not to make a left turn at a time when such turn could not be made with safety. Some decisions have held this duty to be absolute, others have held it to be conditional.

In the section of the Opinion of the Court of Appeals criticized at page 5 of the Petition, the Court of Appeals is merely making it clear that there are three distinct possibilities of negligence in the operation of a lead vehicle which is making a left turn. These are, failure to keep a proper lookout, failure to signal and the making of a turn when the turn cannot be safely made. Obviously, the

legislature intended to cover the situation where a driver has kept a proper lookout and has signalled his turn, but then turns his vehicle directly into the path of an overtaking vehicle which is alongside. Under the undisputed evidence at the case at bar, the truck driver made exactly this type of turn, although he apparently also failed to keep a proper lookout or signal.

The trial court submitted this affirmative duty not to turn unless such movement could be made with safety under the construction of the statute most onerous to Respondent and least onerous to Petitioner. The charge clearly required the jury to find that the obviously unsafe conduct of the truck driver was also conduct which would not have been engaged in by a reasonably prudent person, and also that such conduct led to a foreseeable accident.

Respondents earnestly submit that the Petitioner presents herein a complaint without substance or support, entirely unrelated to any purported reason stated in the Petition for the granting of a writ, and that the position taken by Petitioners is refuted by every decision of every Court that has construed either the Texas statute or a similar statute. It is difficult to see how a Court of Appeals opinion, which is entirely consistent with the Texas law, and harmonius with the decisions of other states and other circuits, can result in such a jurisprudential upheaval as to require the corrective labor of the Supreme Court of the United States.

CONCLUSION

WHEREFORE, Respondents respectfully submit that the Petition for certiorari should be denied.

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I certify that a copy of the foregoing Reply to Petition for Writ of Certiorari has been mailed, on this 13 day of February, 1959, to the Petitioner's attorney, Mr. Reagan Sayers, 304 Century Life Building, Fort Worth 2, Texas.

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